BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LYNETTE C. STOCKTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 225,929
AMERICAN INSULATED WIRE	)	
Respondent	)	
AND	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Jon L. Frobish dated November 13, 1997, wherein the claimant was granted temporary total disability compensation and medical treatment for an injury suffered when a copper wire reel weighing 250 to 350 pounds fell on her right foot.

ISSUES

(1) Whether the Order of the Administrative Law Judge supports the number of weeks of temporary total disability compensation ordered.

(2) Whether the claim is barred by K.S.A. 44-501(d)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board must first determine whether it has jurisdiction to review the above issues when appealed from a preliminary hearing order. K.S.A. 44-534a, as amended, allows appeals from preliminary hearings when considering the issues dealing with whether an employee suffered an accidental injury, whether the injury arose out of and

in the course of the employee's employment, whether notice is given or claim timely, or whether certain defenses apply. These issues are considered jurisdictional and subject to review by the Appeals Board . The first issue raised by respondent deals with the amount of temporary total disability compensation awarded claimant. Respondent contends that the week from August 19 through August 25, 1997, was not a week during which claimant would be entitled to temporary total disability compensation as claimant had been returned to work by the treating physician and was only off work as a result of a disciplinary process stemming from claimant's failure to use an appropriate safety device, i.e., her steel-toed boots, which led to the injury.

As K.S.A. 44-534a grants the Administrative Law Judge the authority to make a preliminary award of either temporary total disability compensation or medical treatment, the Appeals Board finds it does not have jurisdiction at this time to consider this issue and respondent's appeal with regard to this issue is dismissed.

With regard to whether K.S.A. 1996 Supp. 44-501(d)(1) is an issue which can be considered on appeal from a preliminary hearing, the Appeals Board must consider whether claimant's failure to wear the safety boots would fall under the heading of a "certain defense." The Appeals Board has held in the past and continues to hold that the phrase "certain defense" is analogous to some defenses as opposed to any or all defenses. The word "certain" is intended to limit the type and character of defenses which can be said to give rise to Appeals Board jurisdiction. This issue was considered and discussed in detail in Ghramm v. Emporia Construction & Remodeling, Docket No. 199,776 (January 12, 1996). In Ghramm, the Appeals Board held, and continues to hold, that the kind of defenses contemplated by K.S.A. 44-534a(a)(2), as amended, are defenses which go to the compensability of the claim. A specific example listed therein would be the allegation of the willful failure to use a guard. As such, the Appeals Board finds it does have the jurisdiction to consider the issue raised by respondent regarding claimant's failure to use a guard or protection. K.S.A. 44-501(d)(1) states:

> "If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed."

The Administrative Law Judge found that this claim was compensable because the respondent had not furnished 100 percent of the value of the boots. Respondent's policy was that all employees were obligated to use the steel-toed boots and respondent would provide a $60 credit toward the purchase of any of the boots when they were bought through Gellco Clothing & Shoes. In this instance claimant purchased two pairs of foot protection. The first purchase on February 6, 1997, involved a pair of boots which cost $140.04. Respondent paid for the entire cost of the boots, allowed a $60 credit, and

deducted $20.01 from claimant's paycheck on four separate occasions to cover the excess cost. The end result was that claimant paid $80.04 while respondent paid $60 for the boots. These boots were heavy insulated winter boots and claimant did not wear them in the summer time as they were too hot.

Claimant purchased a pair of steel-toed shoes, which were described as being more like tennis shoes, on July 7, 1997. These shoes cost $80.18. Again, respondent allowed a credit of $60 and deducted $20.18 from claimant's next paycheck. The Administrative Law Judge found that since respondent did not pay for 100 percent of the cost of the shoes or boots, then it did not comply with the language set out in K.S.A. 1996 Supp. 44-501 which obligated that the guard or protection be voluntarily furnished to the employee. The Appeals Board agrees with this reasoning.

In addition, the Appeals Board finds, based upon different reasoning, that claimant is entitled to compensation in this matter. When reviewing the limitations of K.S.A. 1996 Supp. 44-501(d), the Appeals Board must consider what is meant by "willful" failure to use a guard or protection. This word has been defined by both the Kansas Supreme Court and the Court of Appeals. The question of willfulness of the employee's acts is one for the finder of facts to decide. Carter v. Koch Engineering, 12 Kan. App. 2d 74, 85, 735 P.2d 247 (1987). The definition of "willful" used by Carter has been in existence in Kansas since the Supreme Court's decision in Thorn v. Zinc. Co., 106 Kan. 73, (1920). In Thorn, the Supreme Court found that the mere voluntary and intentional omission of a workman to use a guard or protection furnished to him is not necessarily to be regarded as willful. In Thorn, the employee, while operating a crusher, used a short stick or lath in order to pry ore between the rollers of the crusher. In the process his hand was pulled into the machine and severely injured. This was contrary to the rules of respondent which obligated the employee to use a long-handled maul for the purpose of breaking up these pieces of ore. Claimant admitted he used the stick "unthoughtedly" as he had seen other workers using the stick in the same manner. The actions by the claimant were not found to be "willful" under K.S.A. 44-501(d). The Supreme Court, in considering the same question in Bersch v. Morris & Co., 106 Kan. 800, 189 Pac. 934 (1920), further defined "willful" as used in the statute to include:

> ". . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . .
>
> "'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.'"

The Supreme Court in Bersch cited Webster's New International Dictionary as a further basis for its definition.

In the present case, the claimant's failure to wear the steel-toed tennis shoes on the date in question resulted from her desire to exchange the tennis shoes for a pair that fit

better. She acknowledged that she was obligated to wear the shoes but did not consider wearing the heavy steel-toed boots bought for winter work because they were too hot.

Claimant further testified, and her testimony is uncontradicted, that on any given day or at any given time a person could walk into the plant and find people not wearing steel-toed shoes, both employees and supervisors. To claimant's knowledge, no one had ever been suspended or reprimanded for not following this policy. The Appeals Board acknowledges respondent's safety footwear policy states that disciplinary action would result if the appropriate footwear protection was not worn at all times but claimant's uncontradicted testimony is that this policy was not rigidly enforced.

The Appeals Board finds, after reviewing the testimony of claimant, the evidence provided, and prior case law, that claimant's actions on the date of accident do not constitute a "willful" failure to use a guard or protection and the Order of Administrative Law Judge Jon L. Frobish granting claimant benefits in the form of medical treatment and temporary total disability compensation should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated November 13, 1997, should be, and is hereby, affirmed and remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of January, 1998.

BOARD MEMBER

c: Harry M. Bass, Independence, Kansas
Stephen J. Jones, Wichita, Kansas
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director